UMW INDUSTRIES (1985) SDN. BHD. (FORMERLY UMW (MALAYA) SDN. BHD.) *a*

v.

AH FOOK @ CHIN KIM FOOK

FEDERAL COURT, KUALA LUMPUR
DATUK CHONG SIEW FAI CJ (SABAH & SARAWAK) *b*
DATO' PEH SWEE CHIN FCJ
DATUK SHAIK DAUD B. HJ. MOHD ISMAIL JCA
[CIVIL APPEAL NO. O3-36-1994]
8 DECEMBER 1995

CONTRACT: *Assignments - Formation - Conditions for affecting absolute legal assignments - Section 4(3) Civil law Act 1956 - Effect - Express notice in writing - Whether there is any limit of time within which notice must be given - Delay in giving notice to debtor - Whether assignee prevented from proceeding with action against guarantor and debtor - Whether delay an irrelevant factor.* *c*

On 15 March 1982 the Malayan Finance Corporation Berhad (finance company) let to one SYL, on hire purchase, a hydraulic excavator for RM179,250. By a letter of guarantee of instant date the respondent guaranteed due payment of all sums due and undertook to indemnify the finance company against all losses or damage arising under the hire purchase agreement. SYL defaulted in paying the instalments and this resulted in the finance company repossessing the excavator, which was then valued at RM85,000. On 18 January 1983, the finance company executed a deed of assignment with the appellant, and by that, it assigned to the latter the hire purchase agreement including all of SYL's benefit, right, title and interest therein. The respondent, however, was only informed of this deed of assignment on 12 April 1985, i.e, about two years after the same was executed. On this same date the appellant also demanded that the respondent pay the finance company the balance of the outstanding instalments and repossession costs amounting to RM53,326. The appellant subsequently obtained a judgment in default against the respondent for the sum. The respondent's application to set aside the judgment was refused by the learned Registrar, whereupon the respondent appealed to the Judge in Chambers. The learned Judge, allowing the appeal, ruled that the assignment was an equitable assignment and therefore the appellant was dutybound to give the respondent reasonable notice of the assignment. According to the Judge, this the appellant failed to do and the inordinate delay had provided the respondent with a defence. Hence this appeal by the appellant. *d* *e* *f* *g*

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the Court):

[1] The learned Judge was wrong in coming to the conclusion that the assigment is an equitable assignment. This apart, his view that notice to the guarantor is an essential requirement to constitute equitable assignment is also flawed. Clearly, in as far as the validity of an equitable assignment is concerned, notice to the debtor or guarantor is not necessary. An assignment may be perfectly valid without such a notice. *h*

[2] Section 4(3) of the Civil Law Act 1956 lays down three conditions for affecting absolute legal assignments. Upon the wording it used, the Deed of Assignment is clearly capable of constituting a valid assignment under this section. There is evidence that the Deed *i*

was signed by a proper officer or at least there is no dispute to that. Conditions (1) and (2) of the sections have thus been fulfilled. As to the third condition of "express notice in writing to the person liable to the assignor", s. 4(3) does not prescribe any limit of time within which notice must be given. In any case, in the present appeal, notice was given before the action was commenced and clearly, was thus a valid notice. Hence, the assignment here is absolute and comes within s. 4(3) Civil Law Act 1956.

[3] The late notice of the assignment has not in any way affected the rights of the asignee to remedies against the guarantor. Although the assignee gave the guarantor the notice of assignment late, there is no evidence of any equity having come into existence prior to the giving of the notice, such that the right of the assignee under the Deed of Assignment is thereby adversely affected. The appellant therefore succeeds in its contention that it had obtained a statutory absolute assignment of all the benefits, rights, titles and interests of the assignor in or under the hire purchase agreement herein, effective on the date of receipt by the respondent of the notice of asssignment dated 12 April 1985, free from all equities and adverse claims.

[Appeal allowed with costs].

[Bahasa Malaysia Translation of Headnotes]

KONTRAK: *Serahanhak - Pembentukan - Syarat-syarat untuk membentuk serahanhak mutlak yang sah - Seksyen 4(3) Akta Undang-undang Sivil 1956 - Kesan - Notis bertulis ekspres - Samada terdapatnya apa-apa had masa dalam tempoh mana notis harus diberikan - Kelewatan dalam memberikan notis kepada penghutang - Samada pemegang serahhak dihalang daripada meneruskan tindakan terhadap penggerenti dan penghutang - Samada kelewatan merupakan faktor yang tak relevan.*

Pada 15 Mac 1982 Malayan Finance Corporation (syarikat kewangan) telah menyewakan kepada sebuah syarikat bernama SYL, atas sewa beli, sebuah pengorek hidraulik bagi jumlah sebanyak RM179,250. Melalui surat gerenti yang mempunyai tarikh semasa responden telah menggerentikan pembayaran kesemua jumlah yang kena dibayar dan telah mengakujanji untuk menanggungrugi syarikat kewangan terhadap kesemua kerugian atau gantirugi yang terbit daripada perjanjian sewa-beli tersebut. SYL telah memungkiri pembayaran ansuran-ansuran dan ini menyebabkan syarikat kewangan mengambil milikan semula pengorek tersebut, yang mana ketika itu dinilaikan pada harga RM85,000. Pada 18 Januari 1983, syarikat kewangan telah menyempurnakan sebuah suratikatan serahanhak dengan perayu, dan dengan itu ia menyerahhak kepada pihak yang terkemudian perjanjian sewa-beli tersebut termasuk kesemua keistimewaan, hak, hakmilik serta kepentingan SYL di dalamnya. Responden, namun begitu, hanya dimaklumkan mengenai suratikatan serahanhak ini pada 12 April 1985, iaitu hampir 2 tahun selepas ianya disempurnakan. Pada tarikh yang sama ini juga perayu telah menuntut supaya responden membayar syarikat kewangan baki ansuran yang masih belum jelas dan kos mengambil milikan semula yang berjumlah sebanyak RM53,326. Perayu telah berikutan itu mendapatkan penghakiman ingkar terhadap responden bagi mendapatkan jumlah tersebut. Permohonan responden untuk mengenepikan penghakiman tersebut telah ditolak oleh Pendaftar yang bijaksana, di mana selepas itu, responden telah merayu kepada Hakim dalam kamar. Hakim yang bijaksana, dalam membenarkan rayuan tersebut, memutuskan bahawa serahanhak tersebut adalah merupakan serahanhak ekuiti dan dengan itu perayu adalah terikat kepada kewajipan untuk memberikan responden notis yang sewajarnya mengenai serahanhak tersebut. Menurut Hakim, hal ini telah tidak dilakukan oleh perayu dan kelewatan yang melampau itu telah memberikan responden suatu pembelaan. Perayu dengan itu telah merayu.

Diputuskan:

Oleh Chong Siew Fai HB (Sabah & Sarawak) (menyampaikan penghakiman Mahkamah):

[1] Hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang dalam mencapai keputusan bahawa serahanhak tersebut merupakan suatu serahanhak ekuiti. Selain dari ini, pendapatnya bahawa notis kepada penggerenti merupakan kehendak penting untuk membentuk serahanhak ekuiti adalah juga cacat. Adalah jelas, bahawa, berkaitan dengan keesahan sesuatu ekuiti, notis serahanhak kepada penghutang atau penggerenti adalah tidak perlu. Sesuatu serahanhak boleh menjadi sah sepenuhnya tanpa notis yang sedemikian.

[2] Seksyen 4(3) Akta Undang-Undang Sivil 1956 membentangkan tiga syarat untuk membentuk serahanhak mutlak yang sah. Berdasarkan perkataan yang ia gunakan, Suratikatan serahanhak tersebut adalah jelas dapat membentuk suatu serahanhak yang sah di bawah seksyen ini. Terdapat keterangan bahawa Suratikatan tersebut telah ditandatangani oleh seorang pegawai yang telah diberi kuasa atau sekurang-kurangnya tidak terdapat pertikaian mengenai hal itu. Syarat-syarat (1) dan (2) seksyen-seksyen tersebut telah dengan itu dipenuhi. Berhubung dengan syarat ketiga mengenai "express notice in writing to the person liable to the Assignor", s. 4(3) tidak membentangkan apa-apa had masa yang ditentukan dalam mana notis haruslah diberikan. Walauapapun dalam rayuan semasa, notis telah diberikan sebelum tindakan dimulakan dan dengan jelasnya merupakan notis yang sah. Dengan itu, serahanhak di sini adalah mutlak dan terkandung di dalam s. 4(3) Akta Undang-Undang Sivil 1956.

[3] Notis serahanhak tersebut yang lewat, dalam apa cara pun, tidak menjejaskan hak pemegang serahhak kepada remedi-remedi terhadap penggerenti. Walaupun pemegang serahhak telah memberikan penggerenti notis serahanhak yang lewat, tidak terdapat keterangan mengenai apa-apa ekuiti yang telah wujud sebelum pemberian notis tersebut, yang mana hak pemegang serahanhak di bawah Suratikatan Penyerahanhak tersebut adalah dengan itu terjejas secara bertentangan. Perayu dengan itu telah berjaya dalam penegasannya bahawa telah mendapat serahanhak statutori mutlak terhadap kesemua keistimewaan, hak, hakmilik dan kepentingan pemegang serahanhak di dalam atau di bawah perjanjian sewa beli di sini, yang berkuatkuasa pada tarikh penerimaan notis serahanhak bertarikh 12 April 1985 itu oleh responden, bebas daripada kesemua ekuiti dan tuntutan yang bertentangan.

[Rayuan dibenarkan dengan kos].

Cases referred to:
Spellman v. Spellman [1961] 2 AER 498 CA ***(refd)***
Curran v. Newpark Cinemas, Ltd. [1951] 1 AER 295 CA ***(refd)***
Re Westerton, Public Trustee v. Gray [1919] 2 Ch. 104 ***(refd)***
Bateman v. Hunt [1904] 2 KB 530 CA ***(refd)***
Compania Colombiana de Seguros v. Pacific Steam Navigation Co. [1965] 1 QB 101 ***(refd)***
Marchant v. Morton, Down & Co. [1901] 2 KB 829 ***(refd)***
Stocks v. Dobson [1853] 4 De G.M. & G. 11 ***(refd)***
Lord Southampton's Estate, Allen v. Lord Southampton, Banfather's Claim [1880] 16 Ch. D 178 ***(refd)***
Gorringe v. Irewell India Rubber And Gutta Percha Works [1886] 34 Ch. D 128 ***(foll)***
Re City Life Assurance Co. (Stephenson's Case) [1926] Ch. 191 ***(foll)***
Re Patrick, Bills v. Tatham [1891] 1 Ch. 82 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Law of Property Act 1925 (UK), s. 136(1)

Other source referred to:
Chitty on Contracts, General Principles, 24th Edn., para. 1160, 1184

For the plaintiff/appellant - P. Pereira; M/s. Skrine & Co.
For the 2nd defendant/respondent - Vidhya Iyer; M/s. Lim Seong Chun & Co.

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

The appellant/plaintiff (assignee) appeals against the decision of the Judge in chambers who overruled the Senior Assistant Registrar and set aside the judgment in default of appearance obtained by the assignee against the respondent/2nd defendant (guarantor) with costs.

The relevant facts of the case may be summarised as follows:

By a hire-purchase agreement dated 15 March 1982 the Malayan Finance Corporation Berhad (the Finance Company) let to one Sin Yew Lee Mining Sdn. Bhd. (the hirer), on hire-purchase, a hydraulic excavator for the price of RM179,250 payable as follows:

(a) RM37,500 as deposit;

(b) the balance thereof by monthly instalments of RM5,906.25 each commencing on 15 April 1982 and thereafter on the 15th day of each succeeding month.

By a letter of guarantee dated 15 March 1982, the guarantor guaranteed the due payment of all sums and the due performance and observance of all terms and conditions by the hirer contained in the hire-purchase agreement, and also undertook to indemnify the Finance Company against all loss or damage that might be sustained by the Finance Company under the hire-purchase agreement.

In breach of the hire-purchase agreement, the hirer fell into arrears of payment of the monthly instalments. The hydraulic excavator was repossessed on 11 November 1982 and the value thereof was assessed by a licensed adjuster to be RM85,000.

By a Deed of Assignment dated 18 January 1983 the Finance Company assigned to the appellant/plaintiff (assignee) all the former's benefit right title and interest in the hire-purchase agreement. The relevant clause of the Deed reads:

> The Assignor hereby assigns unto the Assignee **ALL** the benefit right title and interest of the Assignor in or under the said agreement of the 15 March 1982 together with the right so far as may be necessary to demand performance or sue for and enforce the same in the name of the Assignee **TO HOLD** the same unto the Assignee absolutely.

We would add here, and it was never disputed before us, that benefits and rights of hire-purchase agreements are choses in action, assignment of which are recognised in law as illustrated in *Spellman v. Spellman* [1961] 2 AER 498 CA.

The notice of assignment, however, was not given to the guarantor till 12 April 1985 ie. more than 2 years and 2 months after the deed of assignment was executed, but, be it noted, before the commencement of the action now under appeal.

By a letter dated 12 April 1985 the assignee demanded payment by the guarantor a sum of RM53,326 being the amount made up of the balance of the outstanding instalments (less statutory rebate) plus costs of and incidental to the repossession of the excavator minus the value thereof. Failing to obtain payment as demanded, the assignee on 21 September 1985 began the action presently under appeal against the hirer and the guarantor as the 1st and the 2nd defendants respectively. The guarantor was duly served by substituted service but failed to enter appearance. Judgment in default was accordingly entered against him on 30 September 1986 for the sum claimed, interest and costs.

The guarantor sought to set aside the default judgment but was refused by the Senior Assistant Registrar. On appeal, the learned Judge, as stated at the commencement of this judgment, set aside the default judgment. Hence this appeal by the assignee.

In setting aside the default judgment, the decision of the learned Judge rested solely on issues relating to assignment. She regarded (in our opinion, erroneously) the assignment "an equitable chose in action", and, as such, considered that notice of assignment must be given within a reasonable time and that "a time lapse of 2 years can hardly be described as being reasonable". She continued:

> It is true that clause 3(6) of the guarantee contemplates the assignment of the rights of the 1st defendant under the hire purchase agreement and the 2nd defendant's liability to meet payment upon the default of the 1st defendant is in no way discharged by reason of such an assignment. However, the provisions of that clause did not take away the statutory requirement that the 2nd defendant must be served with a written notice of the assignment within a reasonable time. As this only took place 2 years after the assignment was executed and 3 years after the hire-purchase agreement had been terminated, I consider that the inordinate delay does provide the 2nd defendant with a defence.

It appears to us from the above that the learned Judge had also confused between statutory and equitable assignments. Having regarded the assignment to be an equitable assignment, she applied the statutory requirement of giving notice. Her other reason setting aside the default judgment was that the giving of notice assignment 2 years after the creation of the assignment constituted sufficient merits.

We have considered s. 4(3) of the Civil Law Act, 1956 referred to by Counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

(1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge only; and

(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute ie. one that purports to pass the entire interest of the assignor in the chose in action. Thus in *Curran v. Newpark Cinemas Ltd.* [1951] 1 AER 295 CA Jenkins LJ dealing with s. 136(l) of the Law of Property Act 1925 (English) the equivalent of which in our law is s. 4(3) of the Civil Law Act 1956, said: (Page 299 F-H)

a It is, no doubt, true that s. 136(l) does not require, any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The sub-section does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.

b Looking at the deed of assignment dated 18 January 1983 we are convinced that the document, from the point of the wording or language therein used, is capable of constituting a valid assignment under s. 4(3) of the Civil Law Act 1956. There is evidence that the deed dated 18 January, 1983 was signed by a proper officer on behalf of the assignor or at least there is no dispute or challenge to that. Thus conditions (1) and (2) above are fulfilled.

c This brings us to the question of the notice to the guarantor. As indicated earlier, the complaint of the guarantor was that the notice was given more than 2 years after the execution of the deed of assignment.

Section 4(3) of the Civil Law Act 1956 does not, and, for that matter, there is, as we understand, no law prescribing any limit of time within which notice must be given to the
d debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action e.g. a guarantor. All that the said s. 4(3) requires is that "express notice in writing" be given. Hence notice may be given after the death of the assignor *Re Westerton, Public Trustee v. Gray* [1919] 2 Ch. 104, or after the death of the assignee *Bateman v. Hunt* [1904] 2 KB 530 CA. Notice, however, must be given before the assignee takes out
e its writ. *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* [1965] 1 QB 101, 127-129; but, even then, failure to do so will not prevent the assignee from proceeding with its action on the basis that it is an equitable assignee in which case the Court may require the assignor to be made a party to the proceedings. In our case presently under appeal, notice was given before the action was commenced.

f On the facts and circumstances of the case, and, with respect in contrast to the view of the learned Judge, we find that assignment dated 18 January 1983 is absolute and comes within s. 4(3) of the Civil Law Act 1956.

There remains the question whether the late notice of assignment given by the assignee has in any way affected the rights of the assignee to remedies against the guarantor. Express
g notice in writing under the said s. 4(3) is required to be given so as (1) a legal title to the property assigned may be acquired; (2) to establish the priority of competing assignments, if any. See e.g. *Marchant v. Morton, Down & Co.* [1901] 2 KB 829; and (3) to prevent the debtor or guarantor in our present case paying and, thereby getting a good discharge for the payment from his original creditor. It must be noted that payment to the creditor will be a good satisfaction of the debt or claim, notwithstanding it may have been assigned, if the
h debtor or guarantor has no notice of the assignment. *Stocks v. Dobson* [1853] 4 De G.M. & G. 11; *Lord Southampton's Estate, Allen v. Lord Southampton, Banfather's Claim* [1880] 16 Ch. D 178.

In the instant case under appeal, there is no evidence nor indeed, was it raised that there was any assignment other than that to the assignee i.e the appellant.

i Although the assignee gave the guarantor the notice of assignment late, there is no evidence of any equity having come into existence prior to the giving of the notice, such that the right of the assignee under the Deed of Assignment is thereby adversely affected.

We therefore hold, on the evidence and the facts before us that the appellant succeeds in its contention that it had obtained a statutory absolute assignment of all the benefits rights titles and interests of the assignor in or under the hire-purchase agreement dated 15 March 1982 effective on the date of receipt by the guarantor of the notice of assignment dated 12 April 1985 free from all equities and adverse claims.

The learned Judge appears to consider that notice to the guarantor is an essential requirement to constitute equitable assignment. With respect, inasmuch as concerning the validity of an equitable assignment (which the present assignment under appeal is not), notice to the debtor or guarantor is not necessary. In other words, an assignment may be perfectly valid without such a notice. *Gorringe v. Irewell India Rubber And Gutta Percha Works* [1886] 34 Ch. D. 128. *Re City Life Assurance Co. (Stephenson's Case*) [1926] Ch. 191 at 214, 219-220. *Re Patrick, Bills v. Tatham* [1891] 1 Ch. 82, 87. But it is desirable that such notice be given because until the debtor or guarantor receives the notice, the debtor or guarantor, as the case may be, is entitled to pay to the original creditor. Also, the giving of such notice may discourage further equities attaching to the debt or claim being created, and may affect priorities of competing assignments. See *Chitty on Contracts, General Principles* 24th Edn. paras. 1160, 1184.

There remains the points on valuation of the excavator and the sum claimed in the action which the learned Judge mentioned in her judgment but with which she did not deal. Before us neither of the parties had raised them, which we accordingly take to have been abandoned.

For the above reasons, we allow the appeal. The order of the learned Judge made on 28 February 1994 is hereby set aside. Judgment dated 30 September 1986 be and is hereby restored. The appellant/assignee shall have the costs of the appeals here and below; in the absence of an agreement, such costs be taxed.